In his judgment the learned trial Judge stated: "As to the capital, Miss Lim, her clerk P.W. 3 and the plaintiff P.W. 2 all stated that at Bannon & Bailey in fact $2,500, the amount stated in the document, was handed over to the defendant in Miss Lim's presence. She so certified in the promissory note P.I." He went on to say: "I do not think Miss Lim and her clerk lied to the Court. Having accepted P.W. 1's evidence as true," later in his judgment he had this to say: "But in my view it is quite probable that though $2,500 was in fact paid to the defendant in Miss Lim's presence, subsequent to the ceremony in her chambers, $500 of the capital must have been returned by the defendant to the plaintiff." With respect to the learned Judge I could find nothing on record to support this. On the contrary it was in conflict with the evidence of D.W. 1 that he had received only $2,000 from Miss Lim and that he had told her that he had received the $500 earlier.

In the case of *Vowles* v. *Armstrong-Siddeley Motors, Ltd.*[1] at page 802 MacKinnon L.J. states:—

"I confess I see no escape from the conclusion that the findings in favour of the plaintiff and those in favour of the defendant are mutually destructive. That being so, I do not think we can affirm the judgment for the defendants and equally we cannot accede to Mr. Doyle's appeal to us to enter judgment for the plaintiff. I think there must be an order for a new trial."

In view of the contradictory statements in the judgment of the learned trial Judge and on the authority of the above-mentioned case in my opinion there is no alternative but to allow the appeal and to send the case back for re-trial, costs to abide the result of the re-trial. I therefore make the order accordingly.

Appeal allowed.

Solicitors: *Bannon & Bailey; K. Chelvanayagam.*

LEE PIEW v. PUBLIC PROSECUTOR

[A. Cr. J. (Ong J.) January 15, 1963]

[K.L. — Criminal Appeal No. 66 of 1962]

Penal Code, s.186 — Obstructing public servant — Accused assisting suspect offender under s.29, Minor Offences Ordinance, 1955 — Obstructing police officer from taking possession of goods — Whether seizure of goods of suspect under s.29 before arrest lawful — Minor Offences Ordinance, 1955, ss.29 and 31.

A formal arrest is a condition precedent under section 31 of the Minor Offences Ordinance to seizure of property regarding which any offence was thought to have been committed under section 29 of the said Ordinance. A person commits no offence if prior to such arrest he merely resisted persuasion or offered obstruction to an irregular and improper exercise by any police officer of his powers.

MAGISTRATE'S CRIMINAL APPEAL.

Appellant in person.

H. S. Ong (Deputy Public Prosecutor) for the respondent.

Ong J.: The appellant was convicted by the Magistrate at Kuala Selangor of having voluntarily obstructed a public servant, P.C.11930, in the discharge of his duty as such public servant, thereby committing an offence under section 186 of the Penal Code. He was sentenced to pay a fine of $20 or undergo imprisonment of one week. Against such conviction and sentence he has brought this appeal.

The facts are simple. The appellant was a householder living at 350 Hill Road, Ijok New Village. It seems to me quite clear, in the event, that he was a person whose possession of rubber sheets and scrap at the time in question was not a matter for any reasonable suspicion because otherwise he should already have been prosecuted under section 29(i) of the Minor Offences Ordinance, 1955 in respect of the rubber found within his premises and in his possession.

The appellant was jointly charged and tried with his nephew, Lee Kim Khee, under section 186. The latter has not appealed against his conviction or sentence. The police constable in question was off duty and in civilian clothes when at about 2 p.m. he saw the nephew carrying some rubber on the carrier of his bicycle along the main road. In an endeavour to verify his suspicions about the ownership of the rubber the constable followed Kim Khee to the house of the appellant. Outside that house there followed an alleged struggle between the constable and Kim Khee for possession of the rubber and it was further alleged that the appellant lent his assistance to Kim Khee in such struggle.

Now it is clear that the constable's suspicion against Kim Khee was that he had committed an offence under section 29 of the Minor Offences Ordinance, 1955. Section 31 of that Ordinance provides that "any police officer may arrest without warrant any person offending in his sight against any of the provisions of (*inter alia*) section 29" and the constable accordingly should have arrested Kim Khee in the manner prescribed by section 15 of the Criminal Procedure Code. Instead of doing so, however, he made no attempt whatsoever to arrest Kim Khee, but tried to seize and carry away rubber which was the property of this appellant. In preventing any other person from taking away his property without lawful authority the appellant was doing no more than he was entitled to do, since he had no means of knowing at the time under what colour of right or authority the constable was purporting to act as he did. The conviction is wrong, and I therefore set aside the conviction and sentence and order the fine to be repaid.

Having carefully perused the evidence on the record I am further satisfied that the conviction and sentence passed by the learned Magistrate on Lee Kim Khee, who has not appealed, should also not be allowed to stand. Rightly or wrongly, the constable should forthwith have arrested Kim Khee "for offending in his sight against the provisions of section 29." Then it would have been right and proper that

he should take possession of the rubber as evidence, and any resistance offered by Kim Khee would have amounted to voluntary obstruction of a public servant in the discharge of his duty as such public servant. There was, however, not a scrap of evidence that the constable had exercised his lawful powers of arrest before he endeavoured to take possession of the rubber. In my view a formal arrest was in this type of case a condition precedent to seizure of property regarding which any offence was thought to have been committed, and prior to such arrest Kim Khee committed no offence if he merely resisted persuasion or offered obstruction to an irregular and improper exercise by the constable of his powers. I would accordingly deal with the matter as on revision under section 325 of the Criminal Procedure Code, and quash the conviction and sentence. I direct that the fine be repaid to Lee Kim Khee.

Conviction and sentence quashed.

DENNIS v. SENNYAH

[O.C.J. (Hepworth J.) January 16, 1963]

[Penang — Civil Suit No. 224 of 1961]

Contract — Breach of promise of marriage — Assessment of general and special damages — Principles to be applied.

Damages — Breach of promise of marriage — Assessment — Court's discretion.

The plaintiff, the daughter of a Marine Department clerk became engaged to be married to the defendant, a Revenue Officer in the Customs Department at Johore Bahru on December 12, 1959. On May 28, 1960 it was agreed between the plaintiff and the defendant that the marriage should take place on August 20, 1960. On August 10, 1960 the defendant broke off the engagement and refused to marry the plaintiff. The plaintiff now sued the defendant for damages for breach of promise to marry and special damages for expenses incurred thereby.

Held: that damages in an action for breach of promise of marriage are almost entirely in the discretion of the Court. They may be of a vindictive and uncertain kind, not merely to repay the plaintiff for temporal loss but to punish the defendant in an exemplary manner. While in aggravating circumstances the damages may be at large, they should not be fixed as though they were a fine. In assessing damages the injury to the affections of the plaintiff, the prejudice to his or her future life and prospects of marriage, the rank and condition of the parties and the defendant's means are all matters to be taken into consideration. Applying the above principles the sum of $1,500 was awarded as general damages and $620.10 as special damages.

CIVIL SUIT.

Jag-Jit Singh for the plaintiff.

T. Subbiah for the defendant.

Hepworth J.: This is an action for damages for breach of promise of marriage. The plaintiff is the daughter, now aged 22, of one Clement Christopher Dennis, who is a clerk in the Marine Department, Penang. The defendant is a Revenue Officer in the Customs Department stationed at Johore Bahru.

On the 12th December, 1959, the plaintiff and the defendant became engaged to be married. On the 28th May, 1960, it was agreed between the plaintiff and the defendant that the marriage should take place in Penang on the 20th August, 1960. On or about the 10th August, 1960, the defendant broke off the engagement and refused to marry the plaintiff.

The plaintiff complains that as a result of the breach by the defendant of his promise to marry her she has endured humiliation and mental anguish and has been put to expense and has suffered damage. She therefore claims general damages for breach of promise of marriage and special damages in the sum of $870.10, particulars of which are set out in the statement of claim.

At the hearing the defendant admitted liability and accordingly the court is only called upon to assess the damages.

The damages in an action for breach of promise of marriage are not measured by any fixed standard and are almost entirely in the discretion of the court. They may be of a vindictive and uncertain kind, not merely to repay the plaintiff for temporal loss but to punish the defendant in an exemplary manner. No measure of damages can be laid down, save that, while in aggravating circumstances the damages may be at large, they should not be fixed as though they were a fine. In assessing damages the injury to the affections of the plaintiff, the prejudice to his or her future life and prospects of marriage, the rank and condition of the parties and the defendant's means are all matters to be taken into consideration. The conduct of the parties may properly be considered in aggravation or mitigation of the damages. (*Halsbury's Laws of England*, 3rd edition, Volume 19, page 773, paragraph 1235).

Damages in respect of specific monetary loss sustained by the plaintiff and naturally resulting from the breach may be recovered if specially claimed.

Documentary evidence in support of the claim for special damage was not forthcoming, except in the case of two small items. In the first item of special damage a sum of $150 was included for saris. As an engagement sari was given to the plaintiff by the defendant's brother (P.W.2), it does not seem to me that there was any necessity for this expenditure. As regards the amount claimed for food in item (1), whereas the father of the plaintiff stated that the total was $200, the brother of the defendant (P.W.2), who was called by the plaintiff, assessed it at a rough estimate at $100. Similarly, with regard to item (2) a sum of $150 claimed by the plaintiff was assessed by P.W.2 at $50. I think that an allowance of $150 for food in item (1) and $100 for food in item (2) will be fair. Allowing items 3, 4, 5 and 6 of the special damage in full I assess the special damage at $620.10.